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THE OPERATION OF THE REFORMED EQUITY PROCEDURE IN ENGLAND.[1]

1. WHAT is the practical benefit resulting from the adoption of a single form of action in law and equity cases?

In former times a litigant at common law had first of all to select his form of action. He had sixty or seventy to choose from, but his success or failure entirely depended on the choice he made. If he chose trespass and did not bring his case within the rules relating to that form of action, it availed him nothing that he clearly would have succeeded had he chosen another form of action. Such a state of things was not conducive to the proper administration of justice. On the other hand, a litigant in equity merely presented a petition stating the facts on which he relied and asking generally for such relief as he might be entitled to in equity, and the respondent was obliged to answer on oath; but both petition and answer had become enormously prolix. Further, courts of law

[1] On November 4, 1912, the Supreme Court of the United States promulgated a set of rules which will change radically the procedure in equity suits in the federal courts. In connection with his work as a member of the committee, Mr. Justice Lurton had occasion to consult with Lord Loreburn, at that time Lord Chancellor of England, as to the operation of the reformed equity procedure introduced by the Judicature Acts in England. Subsequently the Lord Chancellor reduced part of what he had said to writing, in answer to certain leading questions propounded to him by Mr. Justice Lurton. The questions and answers are here given.

were supposed to know nothing of and ignored equitable doctrines, and on the other hand the court of chancery was unable to grant relief in cases within the competence of the common-law courts. And, once again, the court of chancery granted relief of a nature unknown to the common law and refused to grant relief appropriate to actions at law. The result of this was that the litigant really entitled to relief too often failed to obtain it because he instituted proceedings by an inappropriate form of action or in the wrong court, and that a litigant too often could not obtain full relief without instituting proceedings both at common law and in the court of chancery. A person entitled to land might fail to recover it at law because his interest was equitable, or in equity because his interest was legal, or might be unable to recover it at law without first obtaining discovery of his opponents' documents, which he could only do by suit in equity. And, again, a sufferer from nuisance might have to go to law for damages and to equity for an injunction. All this involved uncertainty, useless expense, and great delay. From time to time various mitigations of this really intolerable evil were introduced by statute, but they were partial and left the grievance in the main unredressed. At last by the Judicature Act of 1873 a complete remedy was provided by the simple enactment that all the judges of the High Court should have jurisdiction both in law and equity. If an action is commenced at law which is really appropriate to be tried in a court accustomed to administer equity, it can be transferred and proceed as if it had been commenced in equity, and *vice versa*. And in any case, if any point emerges, the judge has full jurisdiction to apply either principles as the justice of the case requires. No one has ever doubted the wisdom of this change, and its practical benefit is simply that a litigant can no longer be tossed about from one of the king's courts to another, at great cost, and with needless delay, upon grounds which have no justification of utility or public policy. It used to be just as if a surgeon, when called in to a patient, were forbidden to give any medicine or afford any relief except it were surgical.

Corresponding to this provision for fusing the jurisdictions in law and equity another provision was made by which the pleadings of both sides were assimilated. Instead of the old technical forms of pleading which no layman could possibly understand and

which were in use in courts of law, and instead of the infinitely prolix proceeding of bill and answer, which prevailed in equity, a new form of pleading was set up for both sides. It is described in the statutes and rules, and amounts to this: each party must state in writing as shortly as he can what his claim is and how it arises, or in the same way what his defense is and his reply. He must not enter upon any evidence and must not state his case in an embarrassing way. What is required is clearness, brevity, and simplicity, though in fact these virtues are not always present in the pleadings. Either party may be ordered to give further particulars in order to make things plain.

(It may be worth while for Mr. Justice Lurton and his coadjutors to consider the Scottish method of pleading, which, in my opinion, is the best.)

2. May a demurrer and defense upon the merits be combined in one pleading? If so, how has the pleading and practice operated?

Yes. A litigant may state in his defense what facts he relies upon, and at the same time may state that he contends that even if the facts be as alleged by the plaintiff, yet they furnish no cause of action. That is in effect a demurrer. There is no doubt that this practice is beneficial. It may be convenient that the question of law decided by the demurrer should be decided first, and if decided in favor of the defendant it will end the case, unless the plaintiff is allowed to amend and raise a fresh contention. It may be, and generally is, convenient first to ascertain all the facts at a trial, and then to apply the law or equity, as the case may be. Which course is to be taken is usually agreed to by the parties, but, if not agreed, the judge can direct what is to be done. We find it very useful to have as much elasticity as possible in these things, and I am sure no one doubts that all relevant contentions both of fact and law ought to be stated in the pleadings.

3. When is a defense due after the filing of the plaintiff's claim; and what are the methods for obviating delay in coming to an issue?

The normal time is as follows: an action begins with a writ, upon which the character of the claim (for example, money lent, damages for false representation, injunction against infringement of a patent) is quite shortly indorsed.

An appearance must be entered by the defendant at the proper office within eight days.

As soon as the appearance is entered the plaintiff is now bound to issue a summons for directions. This summons deals with all the points of practice likely to arise during the proceedings, and, for example, whether there shall be pleadings, for some cases are considered so simple that pleadings can be dispensed with. Thus an action for nuisance by noise may well be tried without pleadings, the issue of fact being sufficiently apparent from the indorsement of the writ. In the normal case, however, the master will on the summons for directions order pleadings fixing the times for delivery of statement of claim and defense according to the nature of the action. This summons also deals with questions of discovery and other methods which it may or may not be possible to dispose of in advance. If it be impossible, as is often the case with discovery, the issues not being yet defined, the summons is from time to time adjourned, being restored when desirable by either side on notice, so that the cost of a separate summons on each point is avoided. Any time fixed by the master can be enlarged if the justice of the case so requires.

The plaintiff must within the time ordered by the master deliver his statement of claim, setting forth the substance of his case without prolixity but with sufficient fullness. If he does not do this then the defendant may apply to have the action dismissed with costs for want of prosecution.

After the statement of claim has been delivered the defendant must deliver his answer or defense within the time limited by the master. If he does not do this within the proper time the plaintiff may sign judgment in his own favor at the proper office, or obtain from a judge the appropriate relief as in an undefended action.

It will thus be seen that a litigant can always make his adversary proceed with due diligence. It will be observed that the penalties for delay are somewhat summary and severe. This is, I think, necessary in order to defeat tactics or procrastination; but it is rendered safe by the power conferred upon judges and masters

to extend the time for any step in an action if a good ground is made for it, and by the power to set aside any judgment signed by default whenever it is right to do so. In this way, extensions of time are usually agreed between the parties, and no one ever suffers for mere oversight or even for neglect which is not wilful. A judgment by default for some error or carelessness is always set aside on terms as to costs and as to future diligence. In practice this system works extremely well, and it is seldom that any solicitor tries to snap a judgment, because he knows that he will really gain nothing by so doing. But if there is any ground for thinking that unfair procrastination is intended, a peremptory order fixing dates for this or that stage can be and, in proper cases, will be made.

4. What are the functions of referees? And in actual practice is it usual to refer questions of fact and law not in the nature of an account to such referees?

There are official referees, who are permanent officers of the court, and special referees may be appointed to hear a particular case or report on any issue of fact. Speaking broadly, the court has a very wide discretion to refer to them either a case as a whole or any issue in or part of a case whenever there is an account to be taken or some prolonged technical or scientific investigation to be made, or some complicated inquiry or matter more fit for local investigation. It is not practicable to define with accuracy the boundary line beyond which a reference will not be made, but it would be wrong to refer compulsorily any matter which could be conveniently tried in court and involves serious controversy as to the main issues in a case. Judges do not in practice relieve their court of irksome cases by so referring them. It is not done unless there is a good deal of detail, and of a kind which does not require the personal attention of the judge in actually hearing the evidence. The procedure by way of appeal from an official or special referee varies according to whether the court has referred the whole action for trial or has referred a particular issue for report. In the former case, speaking generally, the referee's decision is reviewed only on some point of law. In the latter case, the court may adopt or reject the report, or remit it to the referee for further inquiry or explanation. If it appears on the report that the referee has made

a mistake in law, this, of course, will be put right by the judge; but if a point of law arises, the referee can, and usually would, in his report, state his finding of the fact and how the point of law arises and how he thinks it ought to be decided. Or he might set out the true facts and say that if the point of law be decided one way the result would be judgment for the plaintiff, and, if decided the other way, judgment for the defendant, or partly for one and partly for the other, and so leave the court to pronounce what is the proper conclusion. A pure question of law would never be referred. It is only referred when it depends upon the facts, as yet unascertained, whether or not a point of law arises and how it should be determined.

5. How does the practice of hearing evidence orally in equity cases operate?

In answering this question a distinction must be drawn between hostile litigation and cases which ultimately turn on questions of the construction of documents or the proper mode of executing trusts or administering estates. With reference to the latter, the rules of the Supreme Court have prescribed a special mode of procedure which is initiated by originating summons entitled in the matter of the instrument requiring to be construed, or in the matter of the trusts or of the estate requiring to be executed or administered. In this class of proceedings evidence is usually taken by affidavit, though on particular issues of fact where there is really considerable controversy the judge will direct the issue to be tried on oral evidence as being the mode of trial by which the truth can be most surely ascertained. Where, however, the litigation is hostile or involves questions of character or breach of trust, procedure by originating summons is inapplicable, and the proceedings must be initiated in the normal way by writ of summons. Every action so instituted must, unless the parties otherwise agree, be tried orally, even though it be of such a nature that prior to the Judicature Acts it would have been within the exclusive jurisdiction of the court of chancery.

It is now fully recognized in England that a judge is far more likely to ascertain the truth if he sees and hears the witnesses himself, and can watch the course of the evidence, observe the de-

meanor of the witnesses, and form his own opinion of their intelligence, observation, and credibility. In our courts of appeal this is universally recognized, and it is only with reluctance and upon a clear conclusion that a court of appeal will differ with the opinion of the judge who has had these advantages. Upon the question of comparative cost I believe the system of requiring oral evidence before the court itself is upon the whole cheaper, because the real points of difference emerge at the trial; whereas, if all the evidence is taken by affidavit or by private examination of witnesses beforehand, the counsel preparing the affidavit or examining the witnesses will not know so well what is the real field of controversy, and is apt to cover the whole ground of possible criticism or objection with each witness, so as not to be taken by surprise at the hearing.

Further, if there be any controversy as to facts, cross-examination is necessary, and the examiner before whom this takes place has not the authority possessed by the judge of confining the cross-examination within proper limits, so that a great deal of time is wasted and expense incurred, which could have been avoided had the whole evidence been taken orally in the first instance before the judge. However the matter may be as to costs, I am sure that the practice of hearing evidence orally is incomparably better in all ways for that which is the main purpose, namely, the ascertainment of truth.

6. To what extent do parties actually agree to take testimony by deposition, thus obviating oral testimony?

They do so largely, and indeed generally, in matters of formal proof, and often where they do not greatly differ upon the facts and think their differences are not of considerable importance, or where the cost of oral evidence is out of proportion to the matter at stake. Often they dispense with proof upon particular issues altogether by agreeing upon written admissions of fact which are binding as between themselves upon the trial. I am not aware of any general practice to use depositions upon a large scale in cases where there are real and important controversies as to fact. If the witnesses, however, are abroad or unable to attend, their depositions are often taken by consent, and may be so taken, even without consent, by order of the court.

7. Mr. Griffith in his comment upon the rule in respect to oral evidence predicted that the practice of taking the evidence orally in open court in equity cases would necessitate an increase in the judicial staff. Has this been verified?

Certainly not in my opinion. Whatever increase there has been in the judicial staff during the last thirty years has been due to the increase of commerce and population. I have never heard it suggested that it was due to the practice of taking oral evidence. I think Mr. Griffith's prophecy must be numbered among the numerous forebodings of evil which are the inevitable accompaniment in this country of any effort to obtain law reform.

8. What is the practice of obtaining a discovery or the production of books or documents in a legal action?

It is the same both for actions in law and in equity. Either party to the suit can obtain an order for discovery of documents relevant to the case of the adversary, but a fishing discovery — that is to say, discovery in order to enable the applicant to fish for a cause of action when he has no materials of his own — is disallowed. It must always be a matter for decision upon the circumstances in each case whether it is a fishing application or not. There are numerous decisions illustrating the way in which this rule works. Normally each party must disclose the documents relevant to his opponent's case which are or have been in his custody or control, and make an affidavit that there are no others. He may put in a separate schedule to the affidavit, such of them as he claims to be privileged from inspection. Then his adversary can obtain inspection of such as the judge thinks are not privileged.

9. How is a case made up for appeal, and what methods are adopted for shortening the transcript?

The method is different for the Court of Appeal and the House of Lords, to which an appeal from the Court of Appeal is allowed.

In the Court of Appeal, where there is a great deal of business, including many small cases and many purely interlocutory appeals, a case is not, as a rule, formally made up at all. Copies of the

pleadings and of the documents, and transcripts of the evidence if there has been a transcript made, are furnished to each of the judges. If there has been no transcript, then the evidence is gathered from the trial judge's note or from the notes or recollection of counsel. Each of these pieces, namely, pleadings, documents, and evidence, is separate; no attempt is, as a rule, made to make up a case, and the material is used as it would be on a hearing in the court of first instance. Sometimes, of course, in heavy cases all these materials are printed, but this is where they have been printed in the court of first instance for the convenience of parties.

In the House of Lords it is quite different. The proceeding commences with a petition to the king in Parliament. Then each side has to deliver a statement (called the appellant's or respondent's case), in which they recapitulate what is the nature of the dispute and the history of it in the courts below, and then state their reasons for impugning or sustaining the decision of the Court of Appeal. Following this is a print in clear type of all the pleadings, documents, and evidence, together with the judgment in the courts below, gathered together in one appendix. The parties will omit any matter which is irrelevant, or if one will not agree, the Lords, sitting in a judicial committee, will direct it to be done. All this is bound up in a book.

There is no doubt that the House of Lords has a great advantage in that all the materials for adjudication are presented to it in clear print and in one or more volumes. It helps very greatly to concentrate attention upon the material points. At the same time it is a little expensive in the smaller cases. Notwithstanding these advantages I should not advocate such a method being enforced in the Court of Appeal, because of the multiplicity of cases there heard and the small amount at stake in many of them. But where expense is unimportant it is far the best method.

(The above answers relate to cases in law and equity, but not to admiralty or probate or divorce cases. There is really not very much difference, but I have confined my answers to cases in law and equity.)